IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 18.10.2006

Coram:

The Hon'ble Mr.JUSTICE S.RAJESWARAN

C.R.P.(PD) No.889 of 2006

S.K.Krishnan .. Petitioner/2nd Defendant

vs.

1.Ambal Traders by Partner (P2)
M.Arumugam, having office at
No.5, Shanamugha Raja Street
Gandi Nagar
Ekkattuthangal, Madras-97.

2.Chakrapani
3.E.Achuda Reddiar
4.Vijayalakshmi
5.Krishnaveni
6.Menaka
7.D.Shanthi
8.D.Sridharan .. Respondents/Plaintiffs

Revision Petition filed under Article 227 of the Constitution of India against the order dated 17.4.2006, passed in I.A.No.5557/2006 in O.S.No.8909/1979, on the file of the XIV Judge Asst.City Civil Court, Chennai.

For Petitioner : Mr.R.Margabandu
For Respondents : Mr.T.R.Mani,
Senior counsel, for
Mr.A.Venkatesan.

ORDER:

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This Revision Petition has been filed against the order dated 17.4.2006, passed in I.A.No.5557/2006 in O.S.No.8909/1979, on the file of the XIV Asst.City Civil Court, Chennai.

2. The 2nd defendant is the revision petitioner before this court. The suit is filed by respondents/plaintiffs for a declaration to declare the plaintiffs' title to the suit property and also to restrain the defendants by way of permanent injunction from interfering with the plaintiffs peaceful possession of the

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plaint schedule property.

3. The respondents/plaintiffs state that the 1st plaintiff Thiru Elliah Reddiar (since deceased) was the absolute owner of an extent of 1 acre 87 cents in Survey No.76, T.S.No.87, Block No.1, in Ekkattuthangal village, Madras.97. This property being his ancestral property, the 1st plaintiff entered into an agreement of sale with the 2nd plaintiff on 27.3.1975 under which the 1st plaintiff agreed to sell the said property to the 2nd plaintiff or his nominee. Under the terms of the agreement, the 1st plaintiff agreed to allow the 2nd plaintiff to plot out the said land and obtain lay-out and sell the same to any intending buyers and the 1st plaintiff agreed to receive the sale consideration for each of the plot in instalments either from the 2nd plaintiff or his nominee. On 27.3.1975 the 1st plaintiff as per the terms of the agreement of sale delivered possession of the said land to the 2nd plaintiff. The 2nd plaintiff after obtaining possession of the said ground, plotted out the same into different plots and sold to the intending purchasers and after receiving the sale consideration executed a sale deed in favour of them. The 3rd plaintiff is the allottee of plot No.40 having agreed to purchase the same under the lease-cum-sale agreement executed by the 2nd plaintiff. Therefore the plaintiffs submit that they are in lawful possession and enjoyment of plot No.40 in the capacity of owners/title holders. The 3rd plaintiff subsequently has also put up a superstructure in August 1979 in the said plot. Thus such being the position, the defendants who have no manner of right whatsoever in the said property are attempting to interfere with their possession and enjoyment. Therefore the suit has been laid for the above reliefs. The plaintiffs also have filed a police complaint against the defendants for their unlawful interference.

4. Defendants 1 and 2 in their written statement and in the additional written statement resisted and refuted the contentions and the claim of the plaintiffs.

5. An advocate-commissioner was also appointed at the instance of 2nd defendant and he has also filed a report. For the report filed by the advocate-commissioner, objections were also filed by the defendants particularly, the 2nd defendant S.K.Krishnan. An application in I.A.No.5557/2006 was filed by the 2nd defendant/revision petitioner to examine the said advocate-commissioner as a court witness. The said application, I.A.No.5557/2006 was rejected by the trial court on 17.4.2006. The trial court after duly considering the facts and circumstances of the case has held that the commissioner need not be examined as a court witness at this stage as all the parties having filed their objections and the court has to hear the entire matter before deciding if it is necessary for the court to examine the commissioner as a court witness. It is also held by the trial

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court that the petitioner/2nd defendant was also entitled to cross-examine the advocate commissioner with the permission of the court if necessary. Therefore by holding so, the trial court rejected the application, I.A.Nos.5557/2006. As against that, the 2nd defendant has filed the above revision petition.

6. Heard the learned counsel for the petitioner as well as the learned Senior Counsel appearing for the respondents. I have also gone through the documents filed in support of their submissions and the judgments referred to by them in support of their submissions.

7. The learned counsel for the petitioner submitted that having filed the objections to the report of the advocate-commissioner the revision petitioner is entitled to examine the commissioner as court witness. Therefore he filed a petition before the trial court under Order 6 Rule 10(2) of the Code of Civil Procedure to examine the advocate commissioner as a court witness. According to him, without examination of the advocate commissioner and by merely going by the report submitted by him, the trial court would not be able to effectively adjudicate the issue in hand and consequently great prejudice and loss would be caused to the defendants. He also relied on the the decision reported in 2001 (1) L.W. 236 (Rukmani Devi and 4 others v. R.M.Lakshmandoss) in support of his submission. It is his specific case that the advocate-commissioner being the officer of the court should be permitted to be examined by the party concerned for the proper and effective adjudication of the issue in hand and the rejection of his case by the trial court is contrary to the letter and spirit of the provisions of law, namely, Order 26 Rule 10(2) of the Code of Civil Procedure.

8. Per contra, the learned Senior Counsel appearing for the respondents resisted the case of the petitioner/2nd defendant and contended that no proper reasons have been given by the petitioner for examining the advocate-commissioner. He referred to the petition filed by the petitioner to the effect to show that the prayer sought for by the petitioner was only to examine the commissioner as a court witness. He also referred to the provision under Order 26 Rule 10(2) of C.P.C., which is extracted below:-

> "10. Procedure of Commissioner:- (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him to the court.

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(2) Report and depositions to be evidence in suit:- The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation."

9. The learned Senior Counsel appearing for respondents further submitted that an advocate-commissioner has to be examined as a court witness only at the discretion of the court and the plaintiff or the defendant cannot claim it as a matter of right. He also drew my attention to the order passed by the trial court wherein it is clearly demonstrated that the court below has exercised discretion rightly and held that it is not a right at all for examining the Commissioner as a court witness in view of the fact that all the parties have filed their objections and the court has to hear the entire matter before deciding it necessary to examine the Commissioner as a court witness. Moreover, the trial court has held that if necessary the petitioner/2nd defendant could examine the Commissioner with the permission of the court at a later date. Therefore, according to the learned Senior Counsel, the petitioner/2nd defendant has not been deprived of the right of examining the Commissioner. Therefore no prejudice has been caused to the petitioner/2nd defendant so as to invoke the jurisdiction of this court under Article 227 of the Constitution of India. Therefore it is contended by the learned Senior Counsel that the revision petition before this court filed under Article 227 of the Constitution of India is liable to be dismissed.

10. In support of his submissions, he relied on the decision reported in 2006(3) TLNJ 1 (Civil) (Gnanaraj vs. Bakyalakshmi and another) for the proposition that under Order 26 Rule 10(2) C.P.C. which is the discretion of the court below to examine the advocate-commissioner as a court witness. Only after judicial determination of the court below whether the Commissioner has to be examined or not, the court would take a decision. Therefore, it is not for any party concerned to ask for the examination of an advocate-commissioner as a court witness. While referring to the decision reported in 2006(3) TLNJ 1 (civil) (cited supra), the learned Senior Counsel submitted that the court below in this case has

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properly exercised the discretion in terms of the provisions of Order 26 Rule 10(2) C.P.C., and consequently the impugned order does not suffer from any error of law apparent on the face of the record warranting exercise of supervisory jurisdiction under Article 227 of the Constitution of India.

11. I have considered the rival submissions made by the learned counsel on either side. I am of the view that the court below has rightly exercised the discretion and held that the stage has not come for the court to examine the commissioner as a court witness. However, liberty has also been given and the right has also been reserved for the revision petitioner/2nd defendant to examine the commissioner at a later stage with the permission of the court. That being so, the right of the revision petitioner/2nd defendant is not at all deprived so as to approach this court under Article 227 of the Constitution of India. No prejudice has also been caused to the revision petitioner/2nd defendant as rightly contended by the learned Senior Counsel for the respondents.

12. Now let me consider the decisions relied on by both the sides.

13. In 2001-1-L.W. 236 (cited supra), this court held that the commissioner's report can be admitted in evidence without being marked as an exhibit.

14. This decision does not lend much support to the case of the revision petitioner.

15. In 2006(3) TLNJ 1 (Civil) (cited supra), this court considered elaborately the scope of Or.26 Rule 10(2) CPC.

16. In the above case an application has been filed for appointment of advocate commissioner, was allowed by the trial court but the trial court declined to examine the Commissioner as a court witness and directed that the commissioner be examined as a witness on the petitioner side. Aggrieved by the said order, revision petition was filed before this court and this court held as follows:

> "15. The position could be summed up as under:-
>
> (i) Under Or.26 R.10(2) CPC, the Report of the Commissioner and the evidence taken by him shall be evidence in the suit and shall part of the record;
>
> (ii) The Court itself could examine the Commissioner and in such cases, the Commissioner is to be invariably examined as a

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Court Witness;

(iii) When Application is filed by any of the parties to the Suit to examine the Commissioner, it is the discretion of the Court to allow the Application. But permission should not be withheld arbitrarily. If permission is declined it must be by a reasoned order. When the Court grants permission to the party to examine the Commissioner, it is the discretion of the Court either to examine the Commissioner as a Court Witness or as that of the party's witness;

(iv) In the facts and circumstances of the case, the Court has to judicially determine whether the Commissioner is to be examined as Court witness or the Party's Witness;

(v) The contention that in all the instances the Commissioner is to be examined only as Court witness, is unacceptable. Protection is afforded to the Commissioner from any vexatious examination by either of the party."

17. The ratio laid down by this court in the above decision if applied to the facts of the present case, the trial court has declined to examine the Commissioner as a court witness by giving valid and legally acceptable reasons. Therefore I do not find any infirmity nor illegality in the order of the trial court warranting interference under Article 227 of the Constitution of India.

18. It is for the revision petitioner/2nd defendant to file an appropriate application before the court below seeking permission for examining the commissioner as a witness on his side and not as a court witness. If such an application being filed by the 2nd defendant/revision petitioner, it is for the court below to consider the same on merits and pass orders in accordance with law.

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19. With the above direction, the Civil Revision Petition is disposed of. No costs. C.M.P.No.1/2006 is closed.

sks

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1. The XIV Assistant Judge, City Civil Court, Madras - 104.

2. The Registrar, City Civil Court, Madras.104.

+ one cc to Mr. A. Venkatesan, Advocate sr no. 48818

JE(CO)
NM(05.11.2006)

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